LIBRARY
SUPREME COURT, U. S.

No. 1021

Office-Supreme Court, U.S.
FILED
JAN 15 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

EFRAIN SANTOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MAX COHEN
475 Broadway
Gary, Indiana
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILL. 60618 LA review 5-6581

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Constitutional Provisions Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	15
Appendix A	App. 1
Appendix B	App. 7
Appendix C	App. 8

AUTHORITIES CITED

Cases

Douglas v. Alabama (1965) 380 U.S. 415, 85 S.Ct. 1074	13
Krulewitch v. U. S. (1945) 336 U.S. 440, 69 S.Ct. 716	5
Nibbelink v. U. S., CCA 6 (1933) 66 F. 2d 178	5
Ong Way Jong v. U. S., CCA 9 (1957) 245 F. 2d 392	7
Panci v. U. S., CCA 5 (1958) 256 F. 2d 308	5, 9
Pointer v. Texas (1965) 380 U.S. 400, 85 S.Ct. 1065	13
U. S. v. Clancy (1960) 276 F. 2d 617	5

Statutes

	PAGE
Title 18 USC 371	2, 3
Title 26 USC 4742(a)	2, 3
Title 26 USC 4744(a)(1)	2, 3
Title 28 USC 1254	2

IN THE

Supreme Court of the United States

No.

EFRAIN SANTOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on November 13, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported but is reproduced herein as Petitioner's Appendix A.

JURISDICTION

The opinion and judgment of the Seventh Circuit Court of Appeals was filed and entered on November 13, 1967. A petition for rehearing was filed on November 28, 1967. The petition for rehearing was denied on December 1, 1967, a copy of said order is included herein as Petitioner's Appendix B. The jurisdiction of this Court is involved under Title 28 USC 1254.

QUESTIONS PRESENTED

1. Whether the opinion of the Court of Appeals is in conflict with decisions in other circuits.

2. Whether the opinion of the Court of Appeals deprives the petitioner of his constitutional rights to be confronted by the witnesses against him.

STATUTES INVOLVED

The statutes involved are 18 USC 371, 26 USC 4742(a), 26 USC 4744(a)(1). No question is raised as to the construction and interpretation of these statutes.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Sixth Amendment to the Constitution of the United States of America and particularly that part which reads:

> "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

STATEMENT

Petitioner was charged in five counts of a six count indictment with violation of Title 18 USC 371, 26 USC 4742(a) and 26 USC 4744(a)(1). Petitioner was charged with four others. Two of the defendants entered a plea of guilty to the conspiracy counts before trial commenced. Two other defendants withdrew their plea of not guilty and entered a plea of guilty to a conspiracy count at the conclusion of all the evidence. The cause was submitted to trial by jury on November 14, 1966, and the jury returned a verdict of guilty as to the petitioner on all five counts in which he was charged on November 15, 1966. On December 16, 1966, petitioner was sentenced to a term of imprisonment for five years.

The five counts against the petitioner charged him with four other defendants with unlawful transfer of marijuana on two different occasions and with conspiracy to commit the substantive offenses involved in the transfer of marijuana. Aside from the government chemist only two witnesses testified for the government, both of whom were treasury agents. One of the treasury agents was an undercover agent who participated in the sale and transfer of the marijuana. The other treasury agent was acting as a lookout or "cover" for the other agent and testified as to his movements and contacts with persons seen with the agent.

The crux of this appeal is based upon the admission into evidence over timely and repeated objections of a number of hearsay declarations of co-conspirators who were not on trial and did not testify. The hearsay declarations complained of were those attributed to the two defendants who entered a plea of guilty on the same day that the trial of the cause was commenced and who were, therefore, available to testify. The hearsay declarations involved are reproduced herein as Petitioner's Appendix C.

The proof in the case at bar centered about two purchases of marijuana made by Agent Coulter on April 16, 1966, and May 4, 1966. Coulter, through an informant, contacted the defendants Arroyo; they met in South Chicago and drove to East Chicago, Indiana, and were looking for the petitioner. After driving around for some length they observed petitioner in his automobile. One of the Arroyos emerged from the car, had a brief conversation with petitioner and followed him to a bar. The same defendant, Arroyo, again emerged from the car, had a brief conversation with petitioner, came back to the car and stated that petitioner told him he needed "$50.00 out front". The agent gave Arroyo the $50.00 who was then seen to approach petitioner with his hand extended; petitioner extended his hand and then put his hand in his pocket. About an hour and a half later the marijuana was delivered by the defendant Morales.

On May 4, 1966, Agent Coulter, the two Arroyos and the informant again went to East Chicago. Raymond Arroyo left, returned and the agent testified as to a conversation Arroyo had with petitioner about a purchase of marijuana. The agent gave Arroyo the money. Later on the agent saw the petitioner and Arroyo standing outside of the restaurant. Petitioner came into the restaurant and talked to the defendant DeJesus. DeJesus and petitioner left the restaurant and met Raymond Arroyo.

Later petitioner came back in the restaurant and said to Francisco Arroyo "Everything is ready, let's go". Petitioner left the restaurant and then was observed across the street from the car in which the agent, the informant and Francisco Arroyo were seated. Defendants DeJesus and Raymond Arroyo approached the automobile and DeJesus placed the bag of marijuana on the floorboard of the car, walked across the street and met petitioner. Petitioner and DeJesus then walked back to a building and entered it together. There was no testimony that petitioner ever touched, possessed or sold marijuana.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

This contention is urged in two respects: (1) A conflict in the Circuits as to the rule regarding the order of proof in conspiracy cases and (2) a conflict in the Circuits as to the quantum of proof required to show the existence of a conspiracy which would provide an evidentiary base for the admission of hearsay declarations of co-conspirators.

The rule in the Seventh Circuit as to the order of proof is that declarations of co-conspirators may be presented prior to conclusive establishment of the conspiracy without error so long as the conspiracy is established at some time during the course of the trial, *U. S.* v. *Clancy* (1960) 276 F. 2d 617.

The traditional rule followed by the Fifth, Sixth and Ninth Circuits is that the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all; that before one can be proven to be a conspirator and so bound by the admissions of a co-conspirator there must be some evidence of a conspiracy and his connection with the crime, *Nibbelink* v. *U. S.*, CCA 6 (1933), 66 F. 2d 178; *Panci* v. *U. S.*, CCA 9 (1957), 245 F. 2d 392; *Krulewitch* v. *U. S.*, (1949) 336 U.S. 440, 69 S. Ct. 716 (Concurring opinion of Justice Jackson).

The difficulty with the Clancy rule leads to the situation noted by Justice Jackson in *Krulewitch;* that is, that a conspiracy often is proved by evidence that is admissible only upon the assumption that a conspiracy exists.

The cautionary instruction given by the trial judge in the case at bar:

> "The Court: Ladies and gentlemen: As I have instructed you before, any statements by anyone other than the defendants here cannot at this time be considered as any evidence against these defendants, but is merely preliminary to show what the officer did or knew at a particular time. You will disregard any statement made by the defendants Arroyo about any of the defendants in this case at this time." (R. 102, l. 20—R. 103, l. 5

was meaningless since the party who made the hearsay declaration complained of was not on trial having already entered a plea of guilty to the conspiracy charge.

The hearsay declaration objected to was:

> "It was relative to him going to meet a person by the name of Frankie Santos (petitioner) to get the marijuana." . . .
>
> ". . . I had $300.00 to spend and I wanted it for a pound and a half of marijuana. When we got there he said he would go to see Santos, that they had got 80 pounds of marijuana . . ." (Appendix C)

It is to be noted that these declarations were admitted before there had been any contact with the petitioner; before the alleged conspiracy could conceivably have been formed. The petitioner was purportedly the source of the marijuana supply. He was the *sine qua non* to the existence of the conspiracy.

The declarations were attributed to a defendant not on trial and not subject to cross examination. If the defendant to whom the hearsay declarations were attributed was on trial a cautionary instruction to the jury that the declaration could only be considered as against that defendant making the declaration might have been proper. The defendant making the declaration not being on trial, the declaration was inadmissible for any purpose. There was no testimony at any time that petitioner had dealt with the hearsay declarants on any previous occasion, that the hearsay declarants had contacted the petitioner before meeting him on either of the nights in question or that petitioner knew the hearsay declarants or knew that they were going to contact him to purchase marijuana.

In short, the government was permitted by the admission of these declarations to establish the existence of the conspiracy and the petitioner's connection with it when there was not one scintilla of evidence aliunde the hearsay declaration to connect the petitioner with the transaction.

II.

The opinion of the Court of Appeals apparently resolves this difficulty by holding that there was sufficient proof aliunde the hearsay declarations of the conspiracy and the petitioner's connection with it to warrant the admission of the hearsay declarations. In so holding the Court of Appeals for the Seventh Circuit is sharply at variance with the decisions of the Court of Appeals for the Ninth Circuit and the Fifth Circuit as to the quantum of proof necessary to establish the existence of a conspiracy.

In *Ong Way Jong* v. *U. S.* (1957) 245 F. 2d 392, the evidence was as follows: A co-defendant had sold two ounces of heroin to a government agent. It was admitted

that defendant had no connection with this sale. Later the agent again contacted the co-defendant who claimed he had another source whom he described as an unemployed, ex-bookie and who was going to buy a new Cadillac, had no telephone and used to work in a cannery. This description fitted Ong. The co-defendant said he would contact his friend to procure the narcotics. Agents followed him to the defendant's residence and observed the co-defendant get into a 1951 Cadillac with the defendant Ong. They had a brief conversation. The co-defendant then drove to the apartment of the agent where he informed him that the price offered was too low. The co-defendant and Ong were observed together before the appointed hour in Ong's Cadillac. After a short conversation with the defendant the co-defendant want to a restaurant where he met the agent and told him he was still negotiating for delivery. The co-defendant was then followed to an intersection where he met Ong. There was a brief conversation and Ong left and was gone for about an hour. Later the co-defendant telephoned the agent and told him the delivery would be made in about an hour and that he was waiting for his connection to return with the heroin. About half an hour later the agents saw Ong return to the same intersection in his 1951 Cadillac. The co-defendant joined him. After a short meeting the co-defendant went directly to the apartment of the agent where he delivered heroin in return for $600. The co-defendant was then followed to the same intersection where he met Ong.

On this evidence the Court of Appeals for the Ninth Circuit reversed holding that it was insufficient to prove that Ong was engaged in any criminal activity. In reversing the court stated:

> "There is not scintilla of evidence that Ong was guilty of conspiring to sell narcotics. He is not shown to have touched, possessed, sold or conspired to sell narcotics . . . he was never found with an indicia of possible trading in narcotics or any evidence of the conspiracy in his possession." (id at p. 395)

In *Panci* v. *U. S.* (1958), 256 F. 2d 308, the evidence was as follows: The government agent saw the co-defendant and the defendant together, leave together, sit next to each other in a restaurant drinking coffee. While they were sitting at the counter the defendant withdrew his left hand from his pocket and passed a small brown paper bag behind his back to the co-defendant. They were observed leaving the restaurant together. Later the agent gave the co-defendant money for three ounces of heroin. The co-defendant was observed taking the heroin from a brown paper bag. On this state of the evidence the Court of Appeals held that it was insufficient to establish an evidentiary base to justify the admission of hearsay statements of the co-defendant and two other persons who were named as conspirators in the indictment but not charged. The Court of Appeals there noted that the government did not produce any witiness who testified that he had spoken to the defendant or heard him speak to anyone, that the defendant transferred heroin or had heroin in his possession or that the defendant was in possession of marked money used to purchase heroin or saw the defendant sell or deliver heroin to anyone.

In *Panci* some of the alleged co-conspirators testified and were at least subject to cross examination. In the case at bar the only testimony was that of the government agents who recited what the alleged co-conspirators purportedly told them.

Stripped of the hearsay declarations the only proof to show the petitioner's connection with the conspiracy on April 16, 1966, is that he had a conversation with the defendant Raymond Arroyo. Immediately after the conversation the agent gave Arroyo $50. Arroyo was then observed extending his hand to the petitioner, the petitioner was observed putting his hand in his pocket and petitioner went into a doorway and was not seen again at any time that evening. The marijuana was delivered by other persons approximately an hour and a half later.

The proof of the conspiracy, absent the hearsay declarations, on May 4, 1966, shows only that petitioner was in the vicinity and in the company of two of the defendants and that at one point he was heard to say upon entering the restaurant "Everything is ready let's go". The factual situation is squarely within the purview of the holding in *Ong Way Jong* (*supra*) where the court observed:

> "However all this does not prove Ong was dealing in narcotics. Of course there is a strong presumption that he was. But there is no proof. Unquestionably, someone supplied the illicit heroin which was purchased . . . before one can be proven to be a conspirator and so bound by the admissions of a co-conspirator . . . there must be some evidence produced of a conspiracy and his connection with the crime but no evidence has been adduced which definitely proves that Ong was here engaged in any criminal activity. No one has directly testified to such a connection or any circumstances from which such an accessoryship could be legally inferred. Guilt by association would be the only basis . . ." (id at p. 394)

III.

THE OPINION OF THE COURT OF APPEALS DEPRIVES THE PETITIONER OF HIS CONSTITUTIONAL RIGHT TO BE CONFRONTED BY THE WITNESSES AGAINST HIM.

Finally petitioner contends that the conduct of the trial and the admission of the hearsay declarations deprive the petitioner of his constitutional right to be confronted with the witnesses against him as guaranteed by the Sixth Amendment. This is abundantly clear when the totality of the circumstances surrounding the trial are considered.

The only testimony presented by the government in the trial of the case concerning the two transactions on April 16, 1966, and on May 4, 1966, was that of the two treasury agents Coulter and Cruz. The government did not produce the informant who was present on both occasions nor did the government call as witnesses either of the defendants Arroyo who had immediately before the trial commenced entered a plea of guilty to the conspiracy counts.

The evidence which convicted the petitioner was not the result of what the agents heard or saw the petitioner do. The evidence which convicted the petitioner was the conversation the Arroyos related to the government agent.

No plausible reason has ever been advanced why the government did not or would not produce the defendants Arroyo as part of their case in chief where they could testify as to the purported conversations had with the petitioner. They were in court and had already entered a plea

of guilty so that they could not validly exercise the privilege against self-incrimination. They had already entered a plea of guilty to both conspiracy charges and were, therefore, subject to compelled testimony on the events in question.

In *Panci* v. *U. S.* (*supra*) some of the alleged co-conspirators testified and were subject to cross examination. The only witnesses subject to cross examination in the case at bar were two trained government agents who were merely reciting what the defendants Arroyo had purportedly related to them.

The procedure makes a mockery of the right of confrontation and reduces the right of cross examination to a meaningless fiction. It illustrates graphically the growing trend of government prosecutions utilizing the conspiracy concept to ensnare defendants on meager evidence which would be insufficient to establish guilt on the substantive charge. The government by this device is able to present evidence which any jury must regard as probative evidence of the petitioner's guilt through the lips of a trained government agent.

This Court should not blind itself to the realities of this situation. Quite obviously the defendants Arroyo had "plea bargained". By deliberately failing to produce the defendants Arroyo as witnesses after they had entered a plea of guilty the government avoided subjecting them to cross examination and impeachment. By this procedure the government was able to put before the jury the testimony of the defendants Arroyo without having their credibility impaired by cross examination.

In short, what the opinion of the Court of Appeals now condones is a ventriloquist theory of prosecution. The role of the government agent in the case at bar is analogous to that of a "summary witness" testifying before a grand jury in order to persuade the grand jury to return an indictment.

This Court has in two recent cases involving state prosecutions held that the Sixth Amendment's guarantee of the right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the states by the Fourteenth Amendment, *Pointer* v. *Texas* (1965), 380 U.S. 400, 85 S.Ct. 1065; *Douglas* v. *Alabama* (1965) 380 U.S. 415, 85 S.Ct. 1074. It would indeed be anomalous for this Court to require state courts to conform to the standards set by the Sixth Amendment and to permit its lower courts to sanction and evade the constitutional guarantee by use of the specious conspiracy concept employed in the case at bar.

Particularly in point is the factual situation in Douglas where, in a prosecution for assault with intent to commit murder, the state called as a witness a co-defendant who had already been convicted for the same crime and refused, while acting in his own interest, to answer any questions in reliance on the privilege against self-incrimination. Under the guise of cross examination, after the witness had claimed the privilege, the prosecutor was permitted to read to the jury the witness' alleged confession which implicated the defendant. Significant is the statement in the majority opinion by Justice Brennan that:

> ". . . Loyd could not be cross examined on a statement imputed to but not admitted by him. Nor

was the opportunity to cross examine the law enforcement officers adequate to redress this denial of the essential right secured by the Confrontation Clause. Indeed, their testimony enhanced the danger that the jury would treat the Solicitor's questioning of Loyd and Loyd's refusal to answer as proving the truth of Loyd's alleged confession. But since their evidence tended to show only that Loyd made the confession, *cross examination of them as to its genuineness could not substitute for cross examination of Loyd to test the truth of the statement itself* . . .

Hence, effective confrontation of Loyd was possible only if Loyd affirmed the statement as his . . ." (At p. 1077 S.Ct. Report)

The witnesses against the petitioner in the case at bar were only nominally the treasury agents. Agent Coulter merely acted as a recording of what the defendants Arroyo purportedly said to him. Realistically the witnesses who testified against the petitioner were the defendants Arroyo. That testimony was outside the presence of the petitioner, was unsworn to and never subject to cross examination. As stated by Justice Black:

"It cannot seriously be doubted at this late date that the right of cross examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross examination in exposing falsehood and bringing out the truth in the trial of a criminal case,'" *Pointer* v. *Texas* (supra) (At p, 1068 S.Ct. Report)

CONCLUSION

The opinion of the Court of Appeals permits a conviction to stand on guilt by association. It sanctions a practice increasingly employed by the government in conspiracy prosecutions to convict on the basis of unsworn hearsay declarations. It permits the government to avoid direct evidence even when it is available and destroys the basic right of cross examination. State courts must adhere to the command of the Sixth Amendment. Federal courts are now at liberty to disregard that mandate.

The judgment should be reversed.

Respectfully submitted,

MAX COHEN
Attorney for Petitioner